87-899

NO.

Supreme Court, U.S.
FILED
DEC 2 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

TERM, 1987

CARL F. OGBORNE, PETITIONER

vs.

COMMONWEALTH OF PENNSYLVANIA

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA
NO. 485 EASTERN DISTRICT ALLOCATUR
DOCKET 1987

H. WESTON TOMLINSON, ESQUIRE
F. KIRK ADAMS, ESQUIRE
ATTORNEY FOR PETITIONER
EIGHT WEST FRONT STREET
MEDIA, PA 19063
(215) 565-4490

QUESTION PRESENTED

1. Whether the Petitioner was denied the protection of the Fourth Amendment's prohibition against unreasonable search and seizure when police officers conducting an inventory search of his impounded vehicle opened the hood and found a controlled substance concealed in the left front wheel well, following Petitioner's arrest for driving under the influence, and after the police had received an unverified tip that illegal drugs were concealed in the vehicle?

TABLE OF CONTENTS

Question Presented 1

Table of Contents 2

Table of Authorities 3

Introduction 4

Opinions Below 4

Jurisdiction 5

Constitutional Provisions Involved 5

Statement of the Case 6

Federal Question 9

Reasons Why Writ of Certiorari Should be Granted 10

Appendix:

A. Order of Supreme Court of Pennsylvania 16

B. Order and Memorandum of the Superior Court of Pennsylvania 17

C. Opinion of the Court of Common Pleas of Delaware County, Pennsylvania 23

Certificate of Service 40

TABLE OF AUTHORITIES

Fourth Amendment to the Constitution of the United States 5

Colorado v. Bartive, 479 U.S.___, 93 L.Ed.2d.739, 107 S.Ct. ___ (1987) 12

Illinois v. Lafayette, 462 U.S. 640, 77 L.Ed.2d. 65, 103 S.Ct. 2605 (1987) 12

South Dakota v. Opperman, 428 U.S. 364, 49 L.Ed.2d. 1000, 96 S.Ct. 3092 (1976)..... 10,11

INTRODUCTION

A Writ of Certiorari is respectively sought to review the Order of the Supreme Court of Pennsylvania denying a Petition for Allowance of Appeal from a decision of the Pennsylvania Superior Court affirming the Petitioner's conviction of possession with intent to deliver a controlled substance and driving under the influence of alcohol or a controlled substance.

OPINIONS BELOW

The Supreme Court of Pennsylvania denied the Petition for Allowance of Appeal without an opinion. The Superior Court of Pennsylvania filed a Memorandum adopting the opinion of the Honorable, Rita E. Prescott, Judge of the Common Pleas Court of Delaware County, Pennsylvania which appears at Appendix B. The opinion of Judge Prescott appears at Appendix C.

JURISDICTION

The Order of the Pennsylvania Supreme Court denying the Petition for Allowance of Appeal was entered on October 7, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3) and Rule 20 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fourth Amendment to the Constitution of the United States which provides in pertinent part as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

The Petitioner was convicted of driving under the influence and possession with intent to deliver a controlled substance. The evidence used against the Petitioner at trial included fifty eight packets of vegetable matter treated with phencyclidine which were found in the Petitioner's vehicle during a police inventory search.

On January 20, 1985 the Petitioner's pick-up truck was stopped by a Clifton Heights, Pennsylvania, police officer because the registration tag had expired. The officer asked the Petitioner to perform several field sobriety tests after he became suspicious that the Petitioner was under the influence of alcohol or a controlled substance. When the Petitioner could not perform the tests he was arrested for driving under the influence and his pick-up truck was towed to the police impound yard.

Two other officers were dispatched to conduct an inventory search of the Petitioner's truck. The officers detailed to make the inventory search were told by a superior officer that he had received an unverified tip that illegal drugs were concealed in the truck.

During the inventory search of the Petitioner's truck one of the officers opened the hood and saw a white plastic bag taped inside the left front wheelwell. The bag contained vegetable matter treated with phencyclidine, a controlled substance. The white plastic bag would not have been detected without opening the hood.

The officers conducting the inventory search said they opened the hood in about one third of the inventory searches they conducted. The Clifton Heights Police Department Standard Inventory Form required the officer conducting such a search to list the number of engine cylinders. The officers admitted they were looking for the illegal

drugs supposedly concealed in the truck while they conducted the inventory search.

The Petitioner filed a pre-trial motion to suppress the drugs found in his truck on the grounds that the search under the hood exceeded the scope of a legitimate inventory and the real purpose was an investigatory search for illegal drugs.

The Commonwealth conceded the absence of probable cause or consent. The Commonwealth contended, and the trial court agreed that the search under the hood was a lawful inventory of the impounded vehicle.

The Petitioner was convicted, his post trial motions were denied and he was sentenced to eleven and a half (11 1/2) to twenty three (23) months imprisonment and an additional one (1) year of probation at the completion of the twenty three (23) months.

The Petitioner appealed to the Superior Court of Pennsylvania which affirmed the trial court and adopted the trial judge's opinion. The Petitioner filed a Petition for

Allowance of Appeal to the Supreme Court of Pennsylvania which was denied on October 7, 1987.

FEDERAL QUESTION

The Petitioner first raised the constitutional questions in his pre-trial motion to suppress the evidence seized from his vehicle. The Petitioner contended that the police search under the hood of the truck exceeded the scope of a legitimate inventory and was actually an unreasonable search and seizure in violation of the Fourth Amendment.

This issue was repeatedly raised by the Petitioner in his post trial Motions, Appeal to the Superior Court of Pennsylvania and Petition for Allowance of Appeal to the Supreme Court of Pennsylvania.

REASONS WHY THE WRIT OF CERTIORARI SHOULD BE GRANTED

The decision of the Pennsylvania Supreme Court affirming the Superior Court of Pennsylvania and the Common Pleas Court of Delaware County, Pennsylvania is inconsistent with prior decisions of this Court.

In South Dakota v. Opperman, 428 U.S. 364, 49 L.Ed.2d. 1000, 96 S.Ct. 3092 (1976), this Court approved inventory searches of lawfully impounded vehicles. In Opperman, the defendant's vehicle was lawfully impounded by police for multiple parking violations. At the impound yard a police officer observed a watch on the dashboard and several other items of personal property on the back seat and floor of the car. The officer entered the car to inventory the contents according to normal procedure and using a standard inventory form. The officer looked into the unlocked glove compartment

and found marijuana in a plastic bag. The defendant was convicted of unlawful possession of marijuana.

In the majority opinion by then Chief Justice Burger, this Court noted the procedure of making an inventory of the contents of impounded vehicles was developed by local police departments in response to three (3) distinct needs: First, the protection of the vehicle owner's personal property while the vehicle is in police custody; Second, the protection of the police from claims or disputes over lost or stolen property; Third, the protection of the police from potential danger resulting from the presence of hazardous materials or substances. South Dakota v. Opperman, supra., 49 L.Ed.2d. at 1005.

It was recognized that an inventory would often include an examination of the unlocked glove compartment, since it is a customary place to keep documents relating to ownership and registration, as well as a

place for the temporary storage of vaulables. 49 L.Ed.2d. at 1007. However, the scope of an inventory search was to be limited to the extent necessary to carry out the caretaking function and the inventory search could not be used as a pretext to conceal an investigatory motive. 49 L.Ed.2d. at 1009.

The purpose and scope of the inventory search has not been changed in more recent decisions of this Court.

In Illinois v. Lafayette, 462 U.S. 640, 77 L.Ed.2d. 65, 103 S.Ct. 2605 (1983), this Court approved a warrantless police inventory search of an arrestee's personal effects incident to his incarceration. In Colorado v. Bartive, 479 U.S. ___, 93 L.Ed.2d. 739, 107 S.Ct. ___ (1987), this Court approved the search of a closed back-pack found inside an impounded vehicle where local police regulations required opening of closed containers and listing of precise contents.

In this case, the courts of

Pennsylvania have authorized a substantial enlargement of the scope of a lawful inventory and have ignored the existence of evidence suggesting an investigative motive for the search of the Petitioner's vehicle.

The area under the hood is not a place where the owner of a vehicle is expected to keep his personal property or registration papers. Since there is no expectation of finding the vehicle owner's personal property under the hood there is no legitimate reason for an inventory search to include the area under the hood. Certainly a search under the hood exceeds the caretaking function served by an inventory.

In affirming the trial court, the Pennsylvania appellate courts have affirmed the view that a search of an area of a vehicle with little or no expectancy of finding the owner's personal property is within the scope of a legitimate inventory, as long as the police follow a standard procedure.

This view would permit the police to search for contraband under the pretext of an inventory by using a "standard" form. The officer conducting an inventory could look into virtually every area of an impounded vehicle where contraband could be possibly concealed without a showing of probable cause or consent.

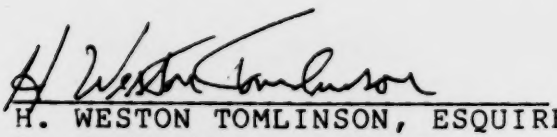
This Pennsylvania view elevates form over substance by turning on the police use of a standard form. Furthermore, it weakens the constitutional safeguards which prohibit investigatory searches of motor vehicles in the absence of probable cause or consent. It does not take much imagination to conceive of a standard inventory form that would allow the police to search every part of a vehicle they have impounded.

Moreover, in this case the evidence strongly suggests that the motive for the search under the hood was to find the illegal drugs which they suspected were concealed somewhere in the truck. The police officers

who conducted the inventory search of the Petitioner's truck had been told by their superior officer that there was reason to suspect that illegal drugs were concealed in the vehicle. The suppression court had to completely ignore this evidence to determine that there was no investigative motive involved in this search.

Therefore it is respectfully suggested that the Petition for a Writ of Certiorari should be granted in order to review, once again, the permissible scope of the police inventory search.

RESPECTFULLY SUBMITTED:



H. WESTON TOMLINSON, ESQUIRE
F. KIRK ADAMS, ESQUIRE
COUNSEL FOR PETITIONER
EIGHT WEST FRONT STREET
MEDIA, PA 19063
(215) 565-4490

SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT

October 14, 1987

F. Kirk Adams, Esquire
Eight West Front Street
Media, Pa. 19063

RE: Commonwealth v. Carl F. Ogborne, Pet.
NO. 485 E.D. Allocatur Docket 1987

Dear Mr. Adams:

This is to advise you that the following Order has been endorsed on your Petition for Allowance of Appeal, filed in the above-captioned matter:

"October 7, 1987.

Denied.

Per Curiam."

Very truly yours,

PATRICK TASSOS
Deputy Prothonotary

/aw
cc: John A. Reilly, Esq.

APPENDIX "A"

J. 02033/1987

IN THE SUPERIOR COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	NO. 2342
	:	
vs.	:	Phila. 1986
	:	
CARL F. OGBORNE,	:	
Appellant	:	

Appeal from the Judgment of Sentence of the Court of Common Pleas, Criminal Division, of Delaware County at No. 46-85.

Before: CAVANAUGH, WICKERSHAM and McEWEN, JJ.

PER CURIAM:

Judgment of sentence affirmed.

APPENDIX "B"

J. 02033/1987

IN THE SUPERIOR COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	NO. 2342
	:	
vs.	:	Phila. 1986
	:	
CARL F. OGBORNE,	:	
Appellant	:	

Appeal from the Judgment of Sentence of the Court of Common Pleas, Criminal Division, of Delaware County at No. 46-85.

Before: CAVANAUGH, WICKERSHAM and McEWEN, JJ.

MEMORANDUM:

On January 20, 1985, appellant was arrested an charged with possession of a controlled substance, possession of drug paraphernalia, possession with the intent to deliver a controlled substance, driving under the influence of alcohol or drugs, and driving a vehicle with expired registration and expired inspection. On March 27, 1985, appellant filed omnibus pre-trial motions containing an application to suppress certain

evidence, including the material found in his truck and the written and oral statements he gave the police while in custody on January 20, 1985. A full evidentiary hearing took place on April 23, 1985. A full evidentiary hearing took place on April 23, 1985 before the Honorable Rita A. Prescott. Thereafter an order was entered on June 20, 1985, dismissing appellant's application to suppress.

On June 24, 1985, appellant filed a motion for disposition in lieu of trial pursuant to 35 Pa.C.S.A. Section 780-118, and the court entered an order appointing a psychiatrist to examine appellant and report to the court. Appellant agreed to waive Rule 1100 for a period from June 23, 1985 to a date sixty (60) days after the physician's report was received by the District Attorney and the court. The physician's report was received by the court on or about August 13, 1985. On September 9, 1985, the court granted the Commonwealth's application for an

extension of time to commence trial and listed the case for trial on the week of November 18, 1985, with the outside date for trial to commence to be November 25th.

On November 19, 1985, following a bench trial before Judge Prescott, appellant was gound guilty of all charges. On November 27, 1985, appellant filed a motion in arrest of judgment and a motion for a new trial. Both appellant and the Commonwealth filed briefs and made oral argument on February 4, 1986. On May 9, 1986, Judge Prescott dismissed appellant's post-trial motions. Thereafter, on July 11, 1986, appellant was sentenced to eleven and one-half (11 1/2) to twenty-three (23) months imprisonment on his conviction of possession with intent to deliver a controlled substance, forty-eight (48) hours) to twenty-three (23) months imprisonment on his conviction of possession with intent to deliver a controlled substance, forty-eight (48) hours to twenty-three (23) months imprisonment

concurrently for his conviction of driving under the influence, and one (1) year probation consecutive to his other sentences for his conviction of possession of drug paraphernalia. Pursuant to appellant's timely motion to reconsider, this sentence was modified by Judge Prescott on July 23, 1986, to permit appellant immediate work release. This timely appeal from the judgment of sentence followed on July 29, 1986.

In this appeal, five issues are presented for our consideration:

1. Did the Trial Court's extension of time for the commencement of trial after September 28, 1985 violate Rule 1100?

2. Was there sufficient evidence to convict the Defendant of Driving Under the Influence?

3. Should the Defendant's conviction of Possession of Drug [Paraphernalia] merge with Possession with Intent to Deliver for the purpose of sentencing?

4. Did the Trial Court err when it refuesed to suppress the drug evidence found under the hood of the Toyota truck?

5. Did the Trial Court err when it refused to suppress the oral and written Statements made by the Defendant while in

police custody?

Brief for Appellant at 6.

We have reviewed the record, briefs of counsel, applicable caselaw and the comprehensive and erudite opinion of Judge Prescott under date of May 9, 1986. Our independent analysis discloses all issues raised to be without merit. In addition we share and adopt Judge Prescott's findings and conclusions as to those issues she addressed.

Judgment of sentence affirmed.

IN THE COURT OF COMMON PLEAS
OF DELAWARE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA : NO. 46-85

vs. :

CARL F. OGBORNE :

Vram Nedurian, Jr., Esquire
Assistant District Attorney
Court House
Media, PA 19063

F. Kirk Adams, Esquire
Attorney for Defendant
1501 Baltimore Pike
Springfield, PA 19064

PRESCOTT, J. FILED: 5/9/86

O P I N I O N

On November 19, 1985, the Defendant Carl F. Ogborne, was found guilty, by a judge sitting without a jury, of the following crimes: Possession of a Controlled Substance; Possession of Controlled Substance with Intent to Deliver; Possession of Drug Paraphernalia; Driving Under the Influence of Alcohol and/or Controlled Substance; and two

violations of the Motor Vehicle Code - Expired Registration and Expired Inspection. The Defendant filed a Motion for New Trial and a Motion in Arrest of Judgment which raised the following issues:

1) Whether this Court's order extending the time for commencement of trial beyond October 23, 1985, violated Pa. R. Crim. Proc. 1100;

2) Whether this Court erred by denying Defendant's Motion to Suppress the controlled substance found in Defendant's truck;

3) Whether this Court erred by denying Defendant's Motion to Suppress certain oral and written statements made by Defendant prior to his arraignment which did not occur until approximately ten hours after his arrest;

4) Whether there was sufficient evidence to sustain Defendant's conviction fro Driving Under the Influence of Alcohol and/or a Controlled Substance; and,

5) Whether the convictions for Possession of a Controlled Substance and possession of Drug Paraphernalia merge with the conviction for Possession of a Controlled Substance With Intent to Deliver.

This opinion is written in disposition of Defendant's post-trial motions and the issues raised thereby.

Before proceeding to review the merits of Defendant's post-trial motions, the facts of the case, as established by the testimony and evidence produced at trial, are set forth as follows:

On January 20, 1985, at or about 12:05 A.M., Corporal Robert Keates of the Clifton Heights Police Department stopped a Toyota truck on Baltimore Pike after observing that the said truck bore an expired New Jersey license plate and an expired New Jersey inspection sticker. The Defendant was driving subject vehicle and was the sole occupant therein. Subsequent to the stop, Corporal Keates detected an odor of alcohol

and burnt marijuana emanating from Defendant's person. Defendant's speech was slurred and his eyes were glassy and he was unable to successfully complete several field sobriety tests required by Corporal Keates. As a result of the foregoing, Defendant was placed under arrest for Driving Under the Influence of Alcohol and/or a Controlled Substance and he was transported to police headquarters. The subject truck was towed to the police impoundment yard and a search of said truck, discussed in detail hereinafter, yielded 58 packets of PCP (a Schedule II substance) totalling 15.3 grams in weight. Defendant gave both oral and written statements to the police admitting possession of PCP and the sale of same to third persons. The admissibility of these statements is one of the issues raised by Defendant's post-trial motions and this issue will be reviewed at length herein.

In the opinion of this Court, the foregoing evidence is sufficient to sustain

Defendant's convictions beyond a reasonable doubt. This Court now proceeds to review the issues raised by Defendant which, in part, challenge the admissibility of certain evidence presented against him.

The first issue raised by Defendant is: Whether this Court's order extending the time for commencement of trial beyond October 23, 1985, violated Pa. R. Crim. Proc. 1100.

The Criminal Complaint in this case was filed on January 20, 1985, which established a mechanical run date of July 19, 1985, under Rule 1100 absent any excludable time. However, on June 24, 1985, Defendant filed a Motion for Disposition in Lieu of Trial Pursuant to 35 P.S. Section 780-118. On the very same day, this Court entered an Order appointing a physician trained in the field of drug abuse and drug dependency to report to the Court his opinion and recommendations concerning Defendant's Motion under 35 P.S. 780-118. Paragraphs 3 and 4 of said Order provided as follows:

"3. All proceedings in this case are hereby stayed at the specific request of the Defendant until such time as a written report from the physician appointed to examine Defendant is reviewed by the Court and parties.

"4. The period of time from the date of this Order until 60 days after receipt of the physician's report shall be excluded from Rule 1100 for determining the period for commencement of trial."

In addition to the foregoing provisions of the Order dated June 24, 1985, the Defendant executed a written Waiver of Rule 1100 for the period of time in question. The subject physician's report was received on August 23, 1985.

In the meanwhile, on July 1, 1985, the Commonwealth filed an Application for an Extension of Time to Commence Trial to November 16, 1985, because of the anticipated delay that would occur while Defendant underwent examination by the court-appointed physician. The subject Application was heard on September 9, 1985, at which time the Commonwealth indicated that an extension to

November 16, 1985, was necessary because of the heavy court docket for the months of September and October which would become even more burdensome because two lengthy homicide cases were scheduled to be tried during those months. Defense counsel objected to any extension of time beyond October 23, 1985, which Defendant contended was the new applicable run date in this case. This Court entered an Order dated September 9, 1985, which extended the time for commencement of trial to November 25, 1985. Defense counsel has objected to the entry of said Order contending that Defendant's rights under Rule 1100 had been violated since no valid reason had been placed on the record extending the time of trial beyond October 23, 1985.

Defendant has misconstrued this Court's Order of June 24, 1985, in that said Order did not establish October 23, 1985, as the new run date in this case. By the plain terms of this Court's Order of June 24, 1985, the period of time from June 24, 1985, (60

days after receipt of the physician's report) was excluded for the purpose of determining the date for commencement of trial. By adding said excluded time to the mechanical run date of July 20, 1985, trial of this case should have commenced no later than November 18, 1985. In granting the Commonwealth's Application for Extension of Time, this Court merely extended the run date in this case for a period of one week, (November 25) which date was the earliest trial date considered possible consistent with the Court's calendar. As trial was commenced and concluded on November 19, 1985, this Court finds no prejudice to Defendant's rights under Rule 1100. This is particularly true since the Court tried to accomodate counsel who had represented to the Court that this was to be a non-jury trial and the case was called for trial on June 13, a time within the 180 days. Counsel for the Defendant then demanded a jury trial on behalf of his client. No jurors were available for the

trial however because none had been summoned in reliance of counsel's representation of the case being a non-jury trial, thus requiring a court continuance.

The second issues raised by Defendant is: Whether this Court erred by denying Defendant's Motion to Suppress the controlled substance found in Defendant's truck.

A police inventory search of a lawfully impounded vehicle is constitutional. South Dakota v. Opperman, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d. 1000 (1976). Neither a warrant nor the existence of probable cause is necessary to conduct an inventory search. Such a search is reasonable if (1) the vehicle was lawfully within the custody of police and (2) the search was in fact an inventory search. Commonwealth v. Randle, 249 Pa. Super. 239, 375 A.2d. 76 (1977); Commonwealth v. Brandt, 244 Pa. Super. 154, 162-163, 366 A.2d. 1238, 1248 (1976).

In the present case, Defendant's truck was legally stopped because of an expired

vehicle registration. While speaking to Defendant, Corporal Keates detected both an odor of alcohol and burnt marijuana and noted his slurred speech and glassy eyes. After Defendant failed three field sobriety tests, he was placed under arrest for Driving Under the Influence of Alcohol and/or a Controlled Substance. The vehicle was impounded pursuant to standard police procedure. Because the car stop was legal, the arrest was with probable cause, and because the impoundment was pursuant to standard procedure, the Defendant's truck was "legally impounded" as required by law.

The second requirement is the search be an "inventory search" as defined by South Dakota v. Opperman, supra. Uncontradicted Commonwealth testimony established that the search conducted in this case was such an inventory search.

After an accused's vehicle is impounded, it is standard procedure in Clifton Heights to complete a "Vehicle

Report" for each vehicle for purposes of specifically identifying the vehicle. This report requires a notation as to the number of cylinders a vehicle has. As a result, the hood of an impounded vehicle had to be opened in order to count the cylinders.

Such a report (Commonwealth Exhibit C-5) was completed in this case. Pursuant to procedure, the hood of the subject truck was opened and the package containing the contraband in question was in place view and was immediately observed taped to the top of a wheel well. In the opinion of this Court, the discovery of the contraband occurred during a legally permissible inventory search of Defendant's vehicle and said contraband was legally admissible at trial.

The third issue raised by Defendant's port-trial motions is: Whether this Court erred by denying Defendant's Motion to Suppress certain oral and written statements made by Defendant prior to his arraignment which did not occur until approximately ten

hours after his arrest.

At the time of Defendant's arrest shortly after midnight on January 20, 1985, (Sunday morning) Corporal Keates and an Officer Senkow were the only two officers on duty charged with the responsibility of handling all calls for the Clifton Heights Police Department. After Defendant was placed in a cell both officers had to respond to a number of calls which kept them busy until after 6 A.M. on the date in question.

During the entire time between Defendant's incarceration and 6:45 A.M., Defendant was kept in a cell equipped with a working toilet, sink (with hot and cold running water) and a water fountain. The cell was at or near room temperature for the entire police station and a turnkey was called in to check on Defendant every half hour.

Since January 20, 1985, was a Sunday, Corporal Keates knew that no Magistrate was sitting and could not be called to arraign

Defendant until after the necessary paperwork on Defendant was completed. This did not occur until after 8 A.M. At that point, a magistrate was contacted to arraign Defendant and said arraignment took place at or about 10:30 A.M.

In the meantime at or about 6:45 A.M., Defendant was taken from the cell he had been placed in to be processed and was twice adviced of his Miranda rights and was given the opportunity to place several phone calls, which Defendant did. Thereafter, Defendant read and signed a document (Commonwealth Exhibit C-3) wherein he acknowledged that he had been given his constitutional rights. Defendant then gave the police an oral statement admitting possession of the PCP found in the subject truck and a little later, Defendant wrote out and signed a confession (Commonwealth Exhibit C-4) wherein he again admitted possession of the subject PCP.

This Court is satisfied that the two

policemen did all they could do in the management of their business during their busy night shift and that any delay in arraigning Defendant was necessary due to exigent circumstances. Therefore this Court concludes that the statements which Defendant made prior to his arraignment were admissible at the trial of the case. See, Comm. v. Keaseley, 501 Pa. 461, 462 A.2d. 216 (1983); Comm. v. Ryles, 274 Pa. Super. 547, 418 A.2d.542 (1980); Comm. v. Davenport, 471 Pa. 278, 370 A.2d.301 (1977).

The fourth issue raised by Defendant is: Whether there was sufficient evidence to sustain Defendant's conviction for Driving Under the Influence of Alcohol and/or a Controlled Substance.

Corporal Robert Keates of the Clifton Heights Police Department was the sole witness to testify with respect to this issue. Corporal Keates stated that when he started to follow the truck being operated by Defendant, he observed the left front wheel

of the truck "swerve on the yellow line or just barely cross over". (N.T. p. 19). Instead of pulling over to the right, Defendant made a left turn onto a parking lot in response to the witness' direction to stop. As Defendant exited the truck, he was asked to produce his license and owner's card. Defendant fumbled throught his wallet and dropped several cards to the ground. After he picked up the cards, Defendant began to speak in a very slurred manner and reached for his vehicle to steady himself. Corporal Keates detected a strong odor of alcohol on Defendant's breath and he also observed that Defendant's eyes were bloodshot and glassy. Defendant was then asked to perform three field sobriety tests (standing on one foot, walking heel to toe and counting backwards) and he was unable to perform any of them. Based upon all of the observations he had made, Corporal Keates was of the opinion that Defendant was intoxicated and unable to operate a motor vehicle safely and placed

Defendant under arrest.

Viewing the foregoing evidence in the light most favorable to the Commonwealth, Comm. v. Maldanado, 494 A.2d.402 (Pa. Super. 1985), this Court concludes that there is a legally sufficient amount of evidence on the record to support Defendant's conviction for Driving Under the Influence of Alcohol and/or a Controlled Substance. This Court finds no merit in Defendant's contention on this issue.

The final issue raised by Defendant is: Whether the convictions for Possession of a Controlled Substance and Possession of Drug Paraphernalia merge with the conviction for Possession of a Controlled Substance with Intent to Deliver.

Defendant's argument on this issue is premature since Defendant has not yet been sentenced. It is sentencing and not the verdict which triggers any merger considerations, Comm. v. Tessel, Pa. Super. ,500 A.2d.144 (1985), and Defendant

must await sentencing before this Court may consider any of the merger issues.

In light of all the foregoing facts and legal authorities cited, this Court has entered an Order bearing even date herewith dismissing Defendant's post-trial motions.

BY THE COURT:

_____

Rita E. Prescott, J.

CERTIFICATE OF SERVICE

I hereby certify that I served three (3) copies of the within Petition for a Writ of Certiorari on the District Attorney of Delaware County, Pennsylvania, on the date set forth below, by personally delivering said copies to the person in charge of the aforesaid office.

DATE: December 3, 1987

F. KIRK ADAMS, ESQUIRE
CO-COUNSEL FOR PETITIONER
EIGHT WEST FRONT STREET
MEDIA, PA 19063
(215) 565-4490
ATTORNEY I.D. #03733